

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NORMA MORENO

Claimant

VS.

FULLER BRUSH COMPANY

Respondent

AND

FIRST LIBERTY INSURANCE CORP.

Insurance Carrier

Docket No. 1,032,177

ORDER

Claimant requested review of the October 2, 2007 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Appeals Board (Board) placed this matter its summary docket on December 21, 2007.

APPEARANCES

Brian D. Pistotnik, of Wichita, Kansas, represents the claimant. Michael D. Streit, of Wichita, Kansas, represents respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant an 11.5 percent impairment of function to her right lower extremity, a figure that represents an average of the two impairment ratings offered by the parties' respective physicians.¹

¹ ALJ Award (Oct. 2, 2007) at 3. The ALJ declined to award any additional TTD benefits. Claimant has not requested review nor briefed that particular issue and therefore, the Board will not consider that aspect of the Award.

The claimant requests review of the nature and extent of her disability arguing that she should be awarded a total of a 20 percent to the right lower extremity², thus providing her with compensation for each of the three conditions diagnosed in her lower leg. Conversely, respondent argues that the 9 percent impairment rating of Dr. Hildebrand, the treating physician should be adopted or in the alternative, the Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The compensability of claimant's accident is not in dispute. Instead, the only issue stems from the nature and extent of her resulting impairment and the methodology employed by the rating physicians. Dr. Randall Hildebrand was the treating orthopaedic surgeon. He assigned a 2 percent impairment for the meniscus tear and repair and an additional 7 percent impairment for a loss or articular cartilage, for a combined rating of 9 percent. Although Dr. Hildebrand identified atrophy in claimant's thigh, as a result of the accident, he testified that the atrophy was attributable to disuse and is therefore not necessarily permanent. He went on to testify that in his view, the *Guides* indicate that atrophy is not a separate component of an injury but merely a component of the injuries. For that reason, he did not include any additional impairment for the atrophy.

At her counsel's request, claimant was evaluated by Dr. Pedro Murati, a physiatrist. Dr. Murati also rated claimant's surgical procedure at 2 percent, and assessed an additional 12 percent to the right lower extremity for the atrophy in claimant's thigh.

The ALJ considered both physicians' opinions and concluded the following:

The court has before it two opinions as to [c]laimant's permanent impairment of function. Each opinion is premised upon a different interpretation of the appropriate approach to rating under the *Guides*. The court will give each opinion equal weight, and will find [c]laimant to have suffered an 11.5% impairment of function to the right lower extremity.³

Claimant argues that the Award should be modified to reflect not only the permanent impairment opinions held by Dr. Murati but increased to reflect the additional diagnosis of decreased cartilage interval which, in Dr. Hildebrand's view, yields a 7 percent impairment. While this condition was not diagnosed by Dr. Murati, the claimant nonetheless asserts that

² All ratings are to the left lower extremity and based upon the 4th edition of the *Guides* (American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*) unless otherwise stated.

³ ALJ Award (Oct. 2, 2007) at 5.

he is entitled to this aspect of his impairment rating in addition to those identified and rated by Dr. Murati. Respondent argues that the Award should be modified to reflect the solely the 9 percent impairment rating offered by Dr. Hildebrand.

As noted by the ALJ, the disparity of the parties' positions stems, in part, from the methodology employed by the physicians in rating claimant's permanent impairment of function. Dr. Hildebrand does not believe the *Guides* authorize a physician to rate atrophy (because it is not necessarily a permanent condition) while Dr. Murati does. And because Dr. Hildebrand had occasion to see the interior of claimant's knee structure, he was able to identify and rate the injury and resulting decrease in cartilage. Dr. Murati did not have this benefit.

After considering both physicians' opinions and testimony, the ALJ averaged the two ratings and assigned an 11.5 percent permanent partial impairment to the lower leg. The Board has considered this approach and under these facts and circumstances, finds the ALJ's Award should be affirmed. The claimant's permanent impairment likely lies somewhere in between the opinions expressed by the two physicians and averaging the two is a reasonable approach.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 2, 2007, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
 Michael D. Streit, Attorney for Respondent and its Insurance Carrier
 Bruce E. Moore, Administrative Law Judge